No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED AIR LINES, INC.,
Appellant,

vs.

GEORGE E. MAHIN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant United Air Lines, Inc. ("United") appeals from the judgment of the Supreme Court of Illinois, entered April 1, 1971, rehearing denied, October 4, 1971, holding that United is subject to Illinois use tax on all fuel loaded aboard its aircraft about to depart from Illinois on interstate and foreign flights. Under the Illinois statute, as construed by the 4 to 3 decision, the tax is on the act of loading the fuel aboard the aircraft. United submits this Statement to show that this Court has jurisdiction of this appeal and that substantial Federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois has been reported at 49 Ill.2d 45, 273 N.E.2d 585 (1971), and is reproduced in the attached Appendix at page 5. The unre-

ported opinion of the trial court, the Circuit Court of Cook County, is reproduced at App. 1.

JURISDICTION

This suit was filed by United in the Circuit Court of Cook County, to enjoin the Illinois Department of Revenue from collecting Illinois use tax on all fuel loaded aboard United's interstate and foreign flights just before departure from the Chicago airports. United contended in argument and briefs before the trial court and in the Illinois Supreme Court that the application of Illinois use tax to all fuel so loaded would violate the Commerce Clause, Article I, § 8, cl. 3, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The Circuit Court of Cook County denied relief, and the Supreme Court of Illinois affirmed by judgment entered on April 1, 1971, stating that the application of the tax in issue did not offend the Commerce Clause. A timely petition for rehearing in the Illinois Supreme Court, asserting the same constitutional issues, was denied on October 4, 1971, and notice of appeal was filed in that Court on December 20, 1971.

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment of the Illinois Supreme Court upholding the constitutionality of the State statute is conferred by Title 28, United States Code, Section 1257(2). The following decisions, among others, sustain such jurisdiction: *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

STATUTE INVOLVED

Ill. Rev. Stat., 1961 to 1969, ch. 120, § 439.3:

> "A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail

from a retailer. Such tax is at the rate . . . of 4% of the selling price of such property . . . .

* * *

"To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

* * *

"(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State . . . ."

* * *

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power* * *

"[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes* * *."

United States Constitution, Amend. XIV, § 1:

"* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. (a) Can Illinois, without creating a direct burden on interstate and foreign commerce in violation of the Commerce Clause, impose use tax on the act of *loading* fuel into aircraft tanks for use on interstate and foreign flights.

(b) Can Illinois, without violating the Commerce Clause, deny United the benefit of a statutory exemption from use

tax for property temporarily stored in Illinois *only because* such storage is with the intention to facilitate United's interstate operations from the O'Hare and Midway airports.

2. Whether the imposition by Illinois of use tax on all fuel loaded aboard United's interstate and foreign flights departing from Chicago constitutes a toll upon interstate commerce in contravention of the fundamental premises of the Commerce Clause—where all of the fuel is purchased outside Illinois, rests in Illinois only for such period as is necessary for United's interstate operations, and except for insignificant amounts is actually consumed outside Illinois.

STATEMENT OF THE CASE

This suit was brought by United against the Illinois Department of Revenue to enjoin it from collecting Illinois use tax on aviation fuel purchased by and delivered to United outside Illinois, temporarily stored in Illinois by United solely for the needs of its interstate and foreign flights departing from Illinois, loaded on such flights just prior to departure, and nearly all actually consumed outside of Illinois by United's departing aircraft.

The Illinois Use Tax Act

The Illinois use tax (Ill. Rev. Stat., 1961 to 1969, ch. 120, §§ 439.1 *et seq.*) is a privilege tax* imposed at a rate of 4% on the use in Illinois of tangible personal property purchased at retail. Although "use" is defined (*id.*, § 439.2) to mean ". . . the exercise . . . of any right or power over tangible personal property incident to the ownership of that property . . .", the statute contains an exemption for property purchased outside of Illinois, temporarily stored

* See *Turner* v. *Wright*, 11 Ill.2d 161, 164-65, 142 N.E.2d 84, 86-87 (1957).

in the State, and used solely outside Illinois (*id.*, § 439.3 (6th unnumbered paragraph)). The statute specifically states that this exemption is "to prevent actual or likely multistate taxation" (*ibid.*).

From 1955, when the Illinois use tax was enacted, until 1963, the temporary storage exemption was consistently construed by the Illinois Department of Revenue to cover fuel purchased outside Illinois by common carriers and temporarily stored by them in the State, so that only that portion of the fuel loaded aboard departing flights (or surface vehicles) that was burned in Illinois was subject to use tax. This was known as the "burn-off" rule. In 1963, without any change of statute and not based on any court decision, the Department repudiated the burn-off rule by a Bulletin which provided in part:

> ". . . that temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck. At this point, *the fuel is converted into its ultimate use,* and, therefore, a taxable use occurs in Illinois.
>
> "If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, . . . they no longer will be able to give a certificate . . . stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax. . . ." (Emphasis added.)

United's Complaint contended, *inter alia,* that the imposition of the tax on the placing or loading of the fuel into the tanks of aircraft (and vehicles of surface common carriers) departing on interstate and foreign journeys would create a direct burden on interstate commerce in violation of the Commerce Clause, and that such tax would also vio-

late the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In the alternative United acknowledged that the portion of the Illinois-laden fuel actually consumed within the State by the departing aircraft constitutionally might be subjected to Illinois use tax.

Facts

There is no controversy as to the facts adduced at trial.

All of the aviation fuel involved in this case is purchased from the Shell Oil Co. and delivered to United in Indiana. The purchase is subject to Indiana gross income tax, currently at a rate of ½% of the purchase price.* The fuel is transported by common carriers to O'Hare and Midway airports in Chicago, where it is stored only for such period as is necessary for purification and United's operational needs. All of it is pumped into aircraft fuel tanks, almost always immediately prior to departures by flights in interstate or foreign commerce.**

United's flight operations are governed by Federal Aviation Agency ("FAA") procedures. This includes assigned departure routes from Illinois. As a consequence of knowing the exact distance flown over these FAA routes, United knows the precise amount of fuel each of its departing flights burns from the moment the engines are started until the plane crosses the Illinois border.

The record shows that every United flight lands at Chicago with from 1.7 to 7.0 times the fuel actually used by the aircraft in departing from Illinois. These very large

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* Burns Ind. Stat. Ann. tit. 64, ch. 26, §§ 64-2601 to 64-2603. Pursuant to the contract with Shell, United is obligated to pay this tax, which amounted to approximately $403,000 for the period between July 1, 1963 and December 31, 1967, and $150,000 for 1968. The Indiana tax continues to be imposed on such purchases.

** No intrastate flights are involved in this litigation.

amounts of inbound fuel are extremely chilled because of the low temperatures encountered in high altitude flights, with the result that much of it stratifies at the bottom of the tanks below the warmer fuel loaded at Chicago, and is the first fuel pumped to the engines on the outgoing interstate flights. Because of this stratification of the large amounts of inbound fuel, coupled with short mileage over Illinois on east-, north- and northwest-bound departures from Chicago, approximately 96.3% of all United's departures from Illinois burn no or *de minimis* amounts of Illinois-laden fuel. Of the remaining 3.7%, only a small portion of the fuel loaded at Chicago is actually burned over Illinois.

Very large amounts of the fuel loaded in Illinois are required by FAA safety Regulations to be on board when the flight lands at its destination in another state.* Such fuel cannot and will not be burned in Illinois nor even outside Illinois by the departing flight. It actually is used by United on other flights that occur after the plane has landed in another state and has commenced another interstate flight, as from Milwaukee to Los Angeles.** Many of these flights do not occur on the same day the plane departed from Chicago.

Chicago is the hub of United's nationwide route system. Of this system, authorized by Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board, only 1.5% of the route miles are in Illinois. In contrast, 13% of all United's flights depart from Chicago and 16.5% of all of the fuel used by United is loaded in Chicago. Of

* For example, the *minimum* FAA reserve for a DC-8 is 8,000 pounds, which is substantially increased upon threat of adverse weather en route or at destination.

** The FAA fuel reserve requirements are carefully adhered to by airlines. A survey in the record of over 13,500 United flights in 1967 disclosed that 100% of them landed with the FAA required fuel reserves.

the flights touching down at Chicago, 73% average only 45 minutes on the ground, and another 18% average an hour and 52 minutes in Chicago.

Of the passengers enplaned throughout United's system, only about 5.4% (all interstate passengers) initiate their flights in Chicago, but 28.5% are part of Chicago traffic. About two out of three of United's Chicago passengers are through passengers.

Thus, because of its geographic location, Chicago is a conduit for a substantial volume of interstate through traffic that both begins and ends outside Illinois. The Chicago airports' role in this continuous interstate movement is to enable passengers to transfer from one flight to another, on the same line or between lines, and to load fuel and supplies aboard the aircraft while it is on the ground no longer than is necessary to have these functions performed.

The Decision Below

By a 4 to 3 vote, the Illinois Supreme Court upheld the position of the Department of Revenue's Bulletin that the fuel was "converted into its ultimate use" when it was loaded into the tanks of the aircraft, and held that a tax was due on all the fuel loaded aboard United's interstate and foreign flights.

The *per curiam* opinion, in which only two justices fully concurred, states explicitly that if the fuel were taken from the State "by some means other than placing it in equipment which would consume it" (App. 8), the temporary storage exemption would extend not merely to stationary storage on the ground, but also to the withdrawal of the property from such storage, to its loading aboard transportation vehicles such as tank trucks or railroad tank cars, and to its transportation from the State.

(App. 14-15.) The rationale for this conclusion is that unless the means of removing the property from the State is included within the scope of the exemption, the exemption would be a nullity. As a result of this distinction between the fuel tanks of aircraft (or other vehicles) and other types of facilities for transporting fuel, the *per curiam* opinion necessarily makes the act of loading the fuel into the fuel tanks of the aircraft as the taxable event. Thus, under the *per curiam* opinion, the tax is imposed on the actual loading of the aircraft which commits the fuel to use in interstate commerce.

The *per curiam* opinion supplements this analysis by the statement that United was not entitled to the temporary exemption because (App. 15):

> "... United does not store in Illinois with any intention that the fuel will be used solely outside this State.* Rather, the fuel is *stored here only to facilitate United's [interstate] operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (Emphasis and footnote added.)

The opinion concludes that United is not entitled to the statutory exemption (an issue not before this Court), and that the resultant application of the tax to all the fuel loaded aboard interstate flights does not violate the Commerce Clause.

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* The opinion does not question the fact that United knew, and therefore presumably intended, that very little of the fuel loaded in Chicago would be consumed in or over Illinois—specifically, of fuel loaded in Illinois, no or *de minimis* amounts are consumed in the State on about 96% of United's interstate departures and very little on the remaining 4% of flights.

The *per curiam* opinion reached the result it did on the basis of two preliminary conclusions: (i) that the imposition of the tax according to the "burn-off" rule, by which only Illinois-laden fuel actually burned in Illinois is subject to use tax, was prohibited as a burden on interstate commerce by this Court's decision in *Helson and Randolph* v. *Kentucky,* 279 U.S. 245 (1929), and (ii) that *Edelman* v. *Boeing Air Transport,* 289 U.S. 249 (1933), and other authorities permit the taxation of all fuel loaded in Illinois even though it is consumed by interstate flights. This pair of conclusions produces the anomalous result that a tax on *all* of the fuel loaded is deemed less of a burden on interstate commerce than a tax on only the *portion* of such Illinois-laden fuel actually consumed in the State.

Although United strenuously asserted the fact that the fuel in question was being subjected both to Indiana gross income tax and Illinois use tax, the *per curiam* opinion does not allude to the question of multiple state taxation in its Commerce Clause analysis.

In a separate short statement, the two concurring justices expressed uncertainty as to whether the burn-off rule was "constitutionally impermissible," but found it unnecessary to answer that question. They affirmed on the basis of "the plain meaning of the statutory language," and agreed (App. 16) with the *per curiam* opinion that:

> "Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports."

Justices Kluczynski, Schaefer and Davis dissented, disagreeing with the conclusion that the burn-off rule was barred by the *Helson* case (as well as with the majority's construction of the Illinois statute).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Judgment of the Illinois Supreme Court Imposing a Use Tax on All Fuel Loaded by United Aboard Its Interstate and Foreign Flights Departing from Illinois Violates the Commerce Clause and is Inconsistent with Controlling Decisions of this Court.

A. The Application of the Illinois Use Tax to the Act of Loading Fuel Aboard Aircraft About to Depart from Illinois on Interstate and Foreign Flights Constitutes an Unconstitutional Burden on Interstate Commerce.

The Illinois use tax, as authoritatively construed by the Illinois Supreme Court, is imposed upon the act of loading fuel into United's planes immediately prior to the commencement of their interstate and foreign journeys from Illinois.* That there is no other taxable event is evident both from the scope of the Illinois temporary storage exemption and from the reasoning of the Illinois Court. The taxable event cannot be the withdrawal of the fuel from temporary storage because, according to the Illinois Court's reasoning, what occurs after such withdrawal is decisive as to whether the tax is imposed. If, for example, after withdrawal the goods are transported from Chicago to Milwaukee in a tank truck for use at the Milwaukee airport, no tax is due (App. 15). Contrawise, the Illinois Court interprets *Helson* to prohibit Illinois from taxing the actual consumption of the fuel by the interstate flights. (App. 9-10.) It follows that, under the Illinois Court's decision, the taxable event is, and can only be, the act of loading it aboard United's aircraft in Illinois preparatory to their interstate

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* See earlier discussion at pp. 8-9 *supra*.

journeys.* Because the loading of the fuel onto the aircraft is the taxable event, the State has attempted to tax an integral and inseparable component of the interstate transportation process in direct violation of numerous decisions of this Court.

The leading case of this Court, which the Illinois Court incorrectly failed to follow, is *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). There Texas claimed that the transfer of gas from the refinery pipeline to an interstate line was sufficient to trigger a severance tax at the moment the fuel passed from one line to the other. This Court held the interpretation given the statute by the State would result in a direct tax upon interstate commerce, stating in part, 347 U.S. at 166:

> ". . . It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."**

This Court emphasized that all local activities had been completed prior to occurrence of the alleged taxable event, and concluded, 347 U.S. at 169:

> ". . . we think that, as a basis for finding a separate local activity, the incidence must be a more substantial

* United acknowledged that, under the decisions of this Court, a use tax could be imposed upon the withdrawal of fuel from storage even if some of that fuel is subsequently used to propel vehicles in interstate commerce. See, e.g., *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933); *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933). As shall be discussed at pp. 14-15, *infra*, this authority is inapplicable because of the structure of the Illinois statutory system which does not tax storage or withdrawal from storage, unlike the taxes in those two cases which were on those events.

** Accord, *Railway Express Agency* v. *Virginia*, 347 U.S. 359, 367-68 (1954); *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W. 2d 137 (Tenn. 1969).

economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another."

Similarly, in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90, 92-94 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427, 433-34 (1947), this Court held that a State could not impose a gross receipts tax upon the loading or unloading of interstate vessels because those activities were so integrally related to interstate commerce that no separate local taxable event could be identified.*

In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), which raised essentially the same point in the context of the Import-Export Clause (Article I, § 10, cl. 2), this Court held that an attempt by the State of California to impose a sales tax at the moment title to fuel oil passed as it was delivered into a ship for carriage to a foreign destination was invalid because "[t]he incident which gave rise to the accrual of the tax was a step in the export process." (329 U.S. at 84.)

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* See, in addition, *Bingaman* v. *Golden Eagle Western Lines*, 297 U.S. 626, 629 (1935); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 180 (1939); *Mid-Continent Air Express Corp.* v. *Lujan*, 47 F.2d 266, 267-68 (D.N.M. 1931); *Nippert* v. *Richmond*, 327 U.S. 416, 423-26 (1946); *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 101 (1929); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-78 (1872); *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849). Cf. *Northwest Airlines* v. *Joint City-County Airport Bd.*, 463 P.2d 470 (Mont. 1970) (invalidating airport head taxes upon enplaning interstate passengers); *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 265 N.E.2d 27 (Ind. 1970), *cert. granted*, 92 S.Ct. 43 (No. 70-99) (same); *Allegheny Airlines* v. *Sills*, 264 A.2d 268 (N.J. Super. 1970). But cf. *Northeast Airlines* v. *New Hampshire Aeronautics Comm'n*, 273 A.2d 676 (N.H. 1971), *prob. juris. noted*, 92 S.Ct. 60 (No. 70-212).

Just as in *Michigan-Wisconsin Pipe Line* and in the other cases cited, the incidence of the use tax in the instant case falls upon an activity—the loading of fuel into aircraft tanks for use in interstate flights—which is an integral part of interstate commerce and does not, under any persuasive theory, represent a separable local activity upon which the State may legitimately exercise its taxation powers. As this Court stated in *Joseph* v. *Carter & Weekes Co.*, 330 U.S. at 427-28:

> "The transportation in commerce, *at the least*, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." (Emphasis added.)

The earlier decisions in *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933); *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933); and *American Airlines, Inc.* v. *Wallace*, 57 F.2d 877 (M.D. Tenn., 1932), *aff'd*, 287 U.S. 565 (1932), do not conflict with the foregoing cases. In fact, the reasoning of this Court in the *Nashville* case adds considerable support to United's position.

All three cases involved a state tax, the legal incidence of which was explicitly on the storage of fuel or on its withdrawal from storage or both. In each situation the tax was due on or before withdrawal without regard to whether the fuel was loaded into a tank truck or an airplane. These cases, therefore, are fundamentally different from the instant case, where the incidence of the use tax cannot be determined until it is ascertained into what the fuel is loaded, hence making the loading the taxable event. This difference was clearly spelled out in *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U.S. at 268:

> ". . . Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to

appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.* Here the *tax is imposed on* the successive exercise of two of those powers, *the storage and withdrawal from storage* of the gasoline. *Both powers are completely exercised before use of the gasoline in interstate commerce begins.* The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations." (Emphasis added.)

The foregoing passage was quoted with approval in *Edelman* v. *Boeing Air Transport,* 289 U.S. at 252, with the determination "... that the statute as applied [in *Edelman*] is identical in operation with that sustained in *Nashville....*"

B. The Illinois Use Tax Unconstitutionally Burdens Interstate Commerce If It Is Based Upon the Mere Intention of United to Use the Fuel Temporarily Stored in Chicago to Facilitate Interstate Commerce.

The *per curiam* opinion of the Illinois Supreme Court declares that the foregoing authority is inapplicable because, under the plain language of the statute, exempt temporary storage must be for use "solely outside this State." (App. 14.) It goes on to say (App. 15) that:

> "... United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is *stored here only to facilitate United's* [*interstate*] *operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (Emphasis added.)

If this passage is to be taken literally, the Illinois Court has concluded that United's act of storing the fuel in Chicago to facilitate its interstate flights from the Chicago airports rendered the temporary storage exemption unavailable to United.*

This extraordinary reasoning would make all the fuel temporarily stored in Illinois by United subject to the use tax because—and only because—it is held for interstate flights departing from Chicago. Such a holding by the Illinois Court likewise would cause the use tax to constitute a direct, unconstitutional burden upon an integral aspect of interstate commerce by virtue of the same decisions of this Court discussed in Part 1A of this Jurisdictional Statement (pp. 11-15, *supra.*)

The Illinois Court has in effect *conditioned* the availability of the temporary storage exemption to common carriers on the fuel *not* being used by them to facilitate the operation of interstate flights departing from Illinois. Ever since *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 30-37 (1910), holding that Kansas could not impose a capital stock fee computed on the *total* authorized capital of Western Union as a condition to conducting local business in Kansas, such a condition upon commerce has been clearly unconstitutional. See, *e.g., Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928) (State cannot impose upon a foreign taxicab company, as a condition of doing business locally, a tax that is invalid under the Equal Protection Clause); *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926) (State cannot constitutionally affix to the privilege of using highways the condition that a carrier assume all the burdens and duties of a common carrier); *Terral* v. *Burke Const. Co.*, 257 U.S.

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* As mentioned previously, there are no intrastate flights involved in this litigation.

529 (1922) (State law invalid which requires foreign corporation, as a condition of continuing to do business, to refrain from resorting to Federal courts).

C. The Illinois Supreme Court Has Misconstrued Controlling Authorities of this Court in Holding that, under the Commerce Clause, Illinois Can Tax All of the Fuel Loaded Aboard Interstate Flights Departing Illinois, but Cannot Tax that Portion of such Fuel that is Actually Consumed in Illinois.

As has been previously shown (pp. 14-15, *supra*), the Illinois Court has incorrectly applied *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and other authorities of this Court to conclude that Illinois may apply its existing Use Tax Act so as to tax all fuel loaded by United on its interstate flights leaving Chicago. The four-justice majority of the Illinois court failed to recognize the essential difference that the taxes involved in the other cases were imposed prior to the loading. This wrongful conclusion was coupled by a misconstruction of *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), by two of the majority justices in their conclusion that that decision rendered the burn-off rule unconstitutional. This reasoning produces the remarkable result that the taxation of all the fuel loaded into United's planes at Chicago is deemed less of a burden on interstate commerce than merely taxing that portion which is actually consumed in Illinois.

Helson involved a Kentucky gasoline tax which was imposed upon the use of fuel within the State. There the interstate carrier purchased fuel in Illinois, which was brought into Kentucky in the fuel tanks of a river ferry. The only contact that fuel had with Kentucky was that it supplied the propulsive power for the interstate ferry across the Ohio River. The fuel was neither stored nor withdrawn from storage in Kentucky. Thus, the only possible incidence

of the Kentucky tax was upon the consumption of the fuel in interstate commerce. Such a tax unquestionably was a direct, unconstitutional burden upon such commerce.*

The principle established by *Helson* is not applicable to the instant situation. Under the Illinois Use Tax Act, fuel brought into the State for storage or for any other purpose becomes taxable (as soon as it comes to rest) because there has been an exercise in Illinois of a right or power over the property incident to its ownership (Ill. Rev. Stat., 1961 to 1969, ch. 120, § 439.2), unless such "use" falls within an exemption such as that for temporary storage. The portion of the fuel shipped into Illinois by United for storage at Chicago and then consumption in Illinois, by interstate flights or otherwise, is subject to use tax from the moment it comes to rest in the State. It is at that time the use tax becomes due on that portion of the fuel. This is the true rationale of the burn-off rule. It is a distortion to characterize the burn-off rule as a direct tax on the consumption of fuel in interstate commerce, as is prohibited by *Helson*.

Even if the amount of fuel consumed by United on its departing interstate flights is the measure of the Illinois use tax, it is well-established that, where there is a suitable local event upon which to base tax, it may be *measured by that part of interstate activities that occur within the state.* This includes fuel consumption within a state by vehicles moving in interstate commerce. See *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 178-79 (1940). See, in addition, *Thompson* v. *Continental Southern Lines*, 222 Ark. 108, 257 S.W.2d 375, 377 (1953); *Larey* v. *Continental Southern Lines*, 243 Ark. 278, 419 S.W.2d 610, 614 (1967); *Department of Revenue* v. *Greyhound Corp.*, 321 S.W.2d 60, 61 (Ky. 1959); *Lake Shore Coach Lines* v. *Alger*, 327 Mich. 146, 41 N.W.2d

* The fuel in *Helson* is analagous to the fuel brought into Illinois by United's planes, which Illinois is not seeking to tax.

503, 508 (1950); *Mason & Dixon Lines* v. *Commonwealth*, 185 Va. 877, 41 S.E.2d 16, 19-20 (1947), *cert. denied*, 331 U.S. 807 (1947).*

In the leading case of *McCarroll* v. *Dixie Greyhound Lines, supra*, this Court held that highway carriers engaged in interstate journeys may constitutionally be required to pay a state privilege and excise tax measured by the number of gallons of fuel burned within the taxing state by the carriers' vehicles using the state's highways (309 U.S. at 178-79). Significantly, this case held that the carriers could not be required to pay a tax upon fuel carried in their vehicles' tanks that would be consumed in other states (309 U.S. at 180).

Based on the foregoing authority, Illinois may have sufficient contacts with that portion of the fuel stored *and burned* in the State to permit Illinois to tax it without offending the Commerce Clause as interpreted by *Helson*. However, for the reasons stated in Parts I A, B and D and II of this Jurisdictional Statement, Illinois is constitutionally prohibited from imposing an unapportioned privilege tax on the loading of the fuel in Illinois. Accordingly, if this

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* In various other circumstances in which a local aspect of interstate commerce was properly subject to state taxation, the courts have sustained a tax measured by the activities carried on within the taxing jurisdiction. See, *e.g.*, *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-05 (1961) (occupation tax on freezer ships measured by value of fish obtained for processing); *Asiatic Trans-Pacific* v. *Maddox*, 371 F.2d 132, 134-35 (9th Cir. 1967) (where services as agent for van and storage companies were performed in Guam, privilege tax measured by gross receipts from services was permissible); *Higman Towing Co.* v. *Cocreham*, 70 F.Supp. 628, 635 (E.D. La. 1957), *aff'd*, 165 F.2d 789 (5th Cir. 1948) (sustained income tax on petroleum transportation company measured by number of barrels transported and mileage they were transported within taxing State).

Court concludes that *Helson* precludes application of a burn-off rule under the circumstances of this case, none of the fuel may be taxed.

D. The Imposition of the Illinois Use Tax on all the Fuel Loaded Aboard Interstate Flights Departing Illinois Constitutes an Unapportioned Privilege Tax on Interstate Activities that Will Result in Multiple State Taxation of Such Activities in Violation of the Commerce Clause.

The Illinois use tax is a privilege tax imposed on the privilege of using tangible personal property. *Turner* v. *Wright*, 11 Ill.2d 161, 164-65, 142 N.E.2d 84, 86-87 (1957). Privilege taxes imposed on interstate activities must, if they are to pass constitutional muster, be apportioned. In *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 439 (1939), involving the imposition of a Washington state privilege tax measured by gross receipts (as is the Illinois use tax), this Court invalidated the attempt to impose such tax on the business of marketing fruit which was sold and shipped to various states and foreign countries, stating:

> "Such a [privilege tax measured by gross receipts], at least when not apportioned to the activities carried on within the state [citations omitted], burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.
>
> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay

a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, *though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.*" (Citations omitted and emphasis added.)

See, e.g., *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 539 (1951) (retailers' occupation tax could not be applied to that portion of gross receipts from orders sent directly from taxing State to head office by customers and shipments were made to customers from head office); *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 661-64 (1948) (State may constitutionally tax gross receipts apportioned according to mileage travelled within State but not receipts derived from mileage ouside of State); *Freeman* v. *Hewit*, 329 U.S. 249 (1946) (unapportioned gross income tax upon certain interstate sales of securities constitutionally impermissible); *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 133-36 (1931) (State income tax apportionment formula unconstitutional); *Cudahy Packing Co.* v. *Hinkle*, 278 U.S. 460, 466 (1929) (unapportioned filing fees and license taxes unconstitutional); cf. *Norfolk & Western Ry. Co.* v. *Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (State formula for taxatiton of property unconstitutional). Compare *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954) (unapportioned privilege tax for doing business in State unconstitutional) with *Railway Express Agency* v. *Virginia*, 358 U.S. 434 (1959) (apportioned franchise tax measured by gross receipts constitutional). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) (privilege tax to do business in State measured by gross receipts constitutionally permissible if fairly apportioned).

It follows that if a privilege tax may be imposed on the fuel used by United on its interstate flights departing Chicago, it must be reasonably apportioned. One basis for such apportionment is according to how much of the fuel is consumed in the state in which it is loaded. The alternative is multiple state taxation of the same fuel, as actually occurs under the Illinois Court's decision. The purchase of the fuel by United is subject to Indiana gross income tax. Illinois in turn would subject all the fuel to Illinois use tax because it is loaded aboard aircraft in Illinois. The result is a classic example of multistate direct taxation of interstate commerce* which this Court uniformly has held repugnant to the Commerce Clause. E.g., *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 662-63 (1948); *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-57 (1938); cf. *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 559-60 (1965).

II. The Illinois Use Tax, as Authoritatively Construed by the Illinois Supreme Court to Lay a Privilege Tax upon Fuel under the Circumstances of this Case, Constitutes an Unconstitutional Toll Upon Commerce among the States.

Part I of this Statement has focused on the specific issue whether the act of loading fuel onto aircraft departing on interstate and foreign flights is a sufficient local incident, severable from the interstate transportation, upon which Illinois can properly tax all the fuel so loaded. Underlying that issue is the fundamental question whether Illinois should be able to tax all the jet fuel temporarily stored by United in Illinois only for such period as is necessary to

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* Of course, if a portion of the fuel loaded in Illinois is subject to Illinois use tax, there still will be multiple state taxation, albeit at a reduced rate.

facilitate its interstate and foreign operations from the Chicago airports, particularly in light of the fact that virtually none of the fuel is actually consumed in Illinois.

As was more fully described in the Statement of the Case (pp. 7-8, *supra*), Chicago is the hub of United's nationwide operations. Solely because of its geography, Chicago receives a huge volume of air service from United and other carriers not attributable to Chicago's own traffic. Much of this service is through traffic with no local aspect. For it, Chicago is merely a connecting link in a never-ending series of continuous interstate movements that begin and end outside of Illinois. For example, only 5.4% of the United system's passengers originate at Chicago but 13% of its daily flights depart from there, and 16.5% of its total fuel is loaded there. The Chicago airports' role in this through traffic is merely to enable passengers to transfer from one flight to another, and to load fuel and supplies aboard the aircraft which remains on the ground no longer than is necessary to perform these functions. Almost two-thirds of United's Chicago pasengers are through passengers. Because of Chicago's transit role, United must temporarily store great quantities of aviation fuel each year at Chicago for operational purposes. This fuel comes to rest in Chicago only for such period as is necessary for purification and for the conduct of United's operations.

Of some 250 million gallons of fuel loaded each year by United on some 85,410 interstate flights departing Chicago, only small amounts of Illinois-laden fuel are consumed in Illinois by only about 3.7% of these departures. The remainder of the fuel is actually consumed in and over other states, frequently after one or more intermediate stops.

In effect, therefore, Illinois has sought to establish itself as a toll-taker on interstate commerce to gain undue advantage from the geographical accident which funnels such a high volume of interstate traffic through the Chicago air-

ports. This toll bears no relation—and, indeed, is not designed to bear any relation—to the fuel which is actually consumed in Illinois. Nor does the toll bear any reasonable relation to fair compensation to the State for services rendered. When "the amount of the tax exceed[s] fair compensation to the State," *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 544 (1950), the tax in question has consistently been invalidated by this Court. 339 U.S. at 544 & n.3.

It was precisely this sort of potential exploitation of geographic position through the imposition of tolls upon interstate commerce which was deemed to be a major defect in the Articles of Confederation which the Framers of the Federal Constitution sought to eliminate. For example, Alexander Hamilton in the *Federalist* observed the dire consequences for commercial relationships which had resulted in Germany because of the imposition of tolls upon commerce as it passed through each principality:

> "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.*

Mr. Justice Story, in his Commentaries on the Constitution, noted that one of the principal reasons for affording Congress the power to regulate commerce among the States was to eliminate the stifling effect upon commerce caused by duties levied by individual States. J. Story, *Commen-*

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* *The Federalist Papers*, No. 22, at 145 (Mentor ed. 1961). See, in addition, *The Federalist Papers*, No. 7, at 62-63 (Hamilton); No. 42, at 267-268 (Madison) (Mentor ed. 1961); *The Writings of James Madison*, Vol. 2, p. 395 (Hunt ed. 1901).

taries on the Constitution of the United States, Vol. 1, §§ 259, 260 (4th ed. Cooley 1873).* See, e.g., *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 438-39, 445-46 (1827).

This Court likewise has frequently recognized that the elimination of tolls upon interstate commerce was a principal objective of the Commerce Clause. As Mr. Justice Grier noted in *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849), a state may not refuse a right of passage to persons or property through her territory, or . . . *exact a duty for permission to exercise it.*" (Emphasis added.) To the same effect, see *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-278 (1872).** More recently, in

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* See generally Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 228-233 (1957):

> ". . . One need not go back to the castles on the Rhine and the Loire, to the hazards and burdens of the overland routes to the Far East, in order to measure the power and ascertain the position of the tolltaker on a strategic trade route. Our own preconstitutional history discloses that the ports and the states astride the trade routes exploited their situation to the disadvantage and displeasure of their less strategically situated neighbors, and that recriminations and reprisals resulted. On more than one occasion, *The Federalist* refers to this unhappy situation and holds out the promise that the proposed Constitution will end it."

See also Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051, 1053 (1960); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 968-972 (1962).

** See *Northwest Airlines* v. *Joint City-County Airport Bd.*, 463 P.2d 470 (Mont. 1970) (invalidating airport head taxes upon emplaning interstate passengers); *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 265 N.E.2d 27 (Ind. 1970), *cert. granted*, 92 S.Ct. 43 (No. 70-99); *Allegheny Airlines* v. *Sills*, 264 A.2d 268 (N.J. Super. 1970).

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 434 (1947), this Court stated that "[t]he avoidance of . . . a local toll on passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause." Again, in *Freeman* v. *Hewit*, 329 U.S. 249, 254 (1946), this Court stated, in invalidating the Indiana gross income tax as applied to certain interstate sales, that "the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

Yet to establish a toll upon all fuel passing through the State in interstate commerce, no matter where that fuel subsequently is to be consumed, is precisely what Illinois has sought to accomplish in the instant case. Illinois has created the functional "equivalent to a rampart of customs duties" (*Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 527 (1935)) through the imposition of its use tax upon fuel loaded on United interstate flights passing through Chicago, even though almost all of such fuel is actually consumed outside of the State. This "unreasonable clog upon the mobility of commerce" (294 U.S. at 527) is a subtle yet real violation of the fundamental rationale of the Commerce Clause.

The reality of the toll being imposed by Illinois becomes apparent by reference to the safety Regulations of the FAA, which require air carriers such as United to load quantities of fuel which are not to be consumed during the particular flight, but must be on board at destination. Based on an extensive survey by United of its flights, it appears that these reserve quantities are in fact on board at destination 100% of the time. In addition to the FAA required reserves, United imposes upon itself a substantial supplementary reserve which, based on an extensive survey, is on board at destination on 99.6% of all of United's

flights. Inasmuch as the destination of all flights involved in this litigation is in other states, this reserve fuel can only be consumed on subsequent flights between other states.

CONCLUSION

For the foregoing reasons, substantial questions are presented in this appeal, which affect not only United but all other similarly situated interstate air and surface carriers, and accordingly the instant case merits plenary review by this Court.

Respectfully submitted,

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